

² The Board notes that, following the January 29, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's December 31, 2020 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 29, 2018 appellant, then a 52-year-old materials handler, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained injuries to his right shin and ankle when he was struck and run over by a forklift while in the performance of duty. He stopped work on that date. OWCP accepted the claim for contusion of the right foot, right foot laceration without foreign body, and crushing injury of the right foot.

By decision dated January 31, 2020, OWCP granted appellant a schedule award for six percent permanent impairment of his right lower extremity. The award ran for 17.28 weeks from September 5, 2019 to January 3, 2020.

In a July 6, 2020 report, Dr. Tiffany K. Wong, a physical medicine and rehabilitation specialist, diagnosed right peroneal motor neuropathy, right tibial motor neuropathy, and right superficial peroneal sensory neuropathy.

On December 31, 2020 appellant request for reconsideration.

In a December 28, 2020 report, Dr. Ian R. Hersh, a podiatric surgery specialist, diagnosed right midfoot fractures, crush injury to right foot, and hematoma lower leg with ulceration. He indicated that appellant had very little improvement over the prior year and a half, with continued pain, numbness, hypersensitivity, and marked loss of function. Dr. Hersh concluded that appellant's injury would leave appellant "with a large degree of permanency" and that his prognosis remained fair.

By decision dated January 29, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

³ 5 U.S.C. § 8128(a); *see J.K.*, Docket Nos. 19-1420 & 19-1422 (issued August 12, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought. If it chooses to grant reconsideration, it reopens and reviews the case on its merits. If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁵

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant in his reconsideration request neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance any relevant legal arguments not previously considered by OWCP. The Board thus finds that appellant is not entitled to a review of the merits based on the first or second requirements under 20 C.F.R. § 10.606(b)(3).⁶

Appellant also failed to submit relevant and pertinent new evidence. OWCP received a July 6, 2020 report from Dr. Wong, who diagnosed right peroneal motor neuropathy, right tibial motor neuropathy, and right superficial peroneal sensory neuropathy. However, Dr. Wong did not address the underlying issue of permanent impairment. OWCP also received a December 28, 2020 report from Dr. Hersh who opined that the injury would leave appellant with permanent impairment; however, Dr. Hersh did not offer an opinion addressing the extent of impairment. The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁷ As such, appellant is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.⁸

⁴ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *Id.* at § 10.608(b); *D.L.*, Docket No. 18-0449 (issued October 23, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁶ *Id.* at § 10.606(b)(3)(i) and (ii).

⁷ *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

⁸ *D.L.*, *supra* note 5; *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *see A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under 20 C.F.R. § 10.606(b), OWCP will deny the request without reopening the case for a review on the merits).

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that OWCP properly denied appellant's December 31, 2020 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board